U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 13 December 2004

BALCA Case No.: 2004-INA-18
ETA Case No.: P2002-TN-04390897

In the Matter of:

SPC MANUFACTURING CO.,
Employer,

on behalf of

J. CRUZ ORTEGA,
Alien.

Appearances: Larry E. Adkison, Esquire
Chicago, Illinois
For the Employer and the Alien

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Plant Manager.[1] The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless

STATEMENT OF THE CASE

On April 12, 2001, the Employer, SPC Manufacturing Company, filed an application for labor certification to enable the Alien, J. Cruz Ortega, to fill the position of Plant Manager. (AF 30). The job required four years of high school and two years of experience in the position offered or two years of experience in the related occupation of high speed printing press operator (canvas) or cutter screen printer (canvas).

On April 25, 2003, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 10). Therein, the CO found that the Employer was not in compliance with 20 C.F.R. § 656.21(b)(5), which requires that the job, as described, present the actual minimum requirements for the job. The employer must not have hired workers with less education, training or experience for jobs similar to that involved in the job opportunity or show that it is not feasible to hire workers with less education, training or experience than that required by the employer's job offer. Specifically, the CO determined that the Alien did not have the required experience prior to hire by the Employer. The CO found that while the Alien had been hired for a different position, it could not be ignored that the Employer hired the Alien with no experience and trained him. In order to rebut this finding, the CO directed the Employer to provide documentary evidence that the requirements listed were the actual minimum requirements and that the Alien met these requirements. The Employer was advised that if it could not document the Alien's experience, it needed to drop the requirement prior to advertising for the position.

The Employer submitted rebuttal, consisting of a letter from its co-founder dated May 19, 2003. (AF 8). She explained that the company started in 1980, and the position of plant manager was originally filled by an employee who started with the company as

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otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

an assistant and worked her way up to plant manager in 1990. In 1997, an individual with a degree in business became the plant manager. The Alien, the current plant manager, was placed in this position because he had worked for the company since 1989, as a part-time laborer at the age of sixteen. She stated that the Alien was slowly groomed and became the assistant plant manager in 1994. From 1996 until 1998 he worked as a "cutter/screen printer," and was subsequently promoted to "high speed printing press operator." During this time period, the Alien was being groomed for more responsibilities and the Alien has been acting as plant manager since January 2000. The Employer contended that it had not hired workers with less education and training than that set forth in the ETA 750A.

A Final Determination ("FD") was issued on July 21, 2003. (AF 6). The CO found that the Employer had failed to provide any evidence that the Alien had gained any experience other than working for the petitioning Employer. The Employer hired the Alien with no experience and trained the Alien. The CO determined that to allow the Employer to require U.S. applicants to have two years of experience would not be favorable to U.S. workers and would be in violation of the regulations.

On August 25, 2003, the Employer filed a Request for Review and the matter was docketed by the Board on December 2, 2003. (AF 1)

DISCUSSION

In the request for review, counsel for the Employer contends that an alien can meet the experience requirement if the experience gained with an employer is in a position significantly different than that which is sought to be certified by that employer. The Employer argues that the position at issue, plant manager, is significantly different than that of the related occupation of high speed screen printer (canvas) or cutter screen printer (canvas). The Employer also points out that the latter experience requirement was listed as the alternate experience on the ETA 750A, and no objection was raised to it

being listed as such.[2] It is the Employer's position that the experience gained by this Alien in his previous employment with the Employer is sufficiently dissimilar to the position sought to be certified to validly meet the experience requirement. The Employer points out that when it originally hired the Alien at the age of sixteen, it was not intended that he would eventually become the plant manager.

The ETA 750B indicates that the Alien's only work experience has been with the instant Employer. He worked as a cutter/screen printer from 1996 to 1998; as a high speed printing press operator on canvas from June 1998 to June 1999, as a management trainee in the job in which certification is being sought from June 1999 to January 2000, and in the position of plant manager from January 2000 to present.

When an alien gains qualifying experience with the employer, "the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification." 20 C.F.R. § 656.21(b)(5). Factors involved in this determination include "the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job and the job salaries." *Delititzer Corp. of Newton*, 1988-INA-482 (May 9, 1990) (*en banc*).

The Employer has detailed, in its request for review, arguments that the instant position is sufficiently dissimilar to that originally held by the Alien. It does not appear that the Employer was given the opportunity to fully raise this argument and defense in the NOF. Given these facts, it is appropriate to remand this matter to the CO for

[2] The Employer's assertion in this respect points to the issue of whether the alternate experience requirement has been tailored to meet the Alien's experience. *See Francis Kellog*, 1994-INA-465 and 544, 1995-INA-68 (Feb. 2, 1998)(*en banc*). That issue, however, was not raised by the CO and thus cannot be raised by this Board at this juncture. *International Student Exchange of Iowa, Inc.*, 1989-INA-261 (Apr. 21, 1992)(*en banc*).

consideration of the issue of whether, pursuant to *Delititzer Corp. of Newton*, the alternate job experience, as obtained by the Alien with this Employer is sufficiently dissimilar to the position at hand.

ORDER

The matter is hereby **REMANDED** to the Certifying Officer for proceedings consistent with the foregoing**.**

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.